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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 651.

JOHN R. BEVIL, JR., *et al.*, *Petitioners*,

vs.

MARGARET O'BOYLE *et al.*, *Respondents*.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Respondents pray that a writ of certiorari be denied to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on September 26, 1958.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Fifth Circuit is reported in 259 F. 2d 506. The District Court wrote no opinion, but made Findings of Fact and Conclusions of Law, and the Judgment and Decree, all of which are in the record (Tr. of R. 110-120).

JURISDICTION.

The date of the opinion and judgment in the Fifth Circuit sought to be reviewed is September 26, 1958.

The date of the Order denying a rehearing is November 7, 1958.

The Jurisdiction of the court arises under U. S. C., Title 28, Section 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

Constitutional Provision:

Fourteenth Amendment: Due Process Clause:

> "* * * nor shall any state deprive any person of life, liberty, or property, without due process of law. * * *"

Federal Statutes:

28 U. S. C., Secs. 1331, 1332: Diversity of Citizenship, pertaining to "matters in controversy" in excess of $3,000.

26 U. S. C. 827 (1939), 6324 (1954), Federal Tax Lien.

Texas Statutes:

Art. 1975, Creating Right to Sue Non-Residents in Cases Involving Title to Land;

1976, Creating Right for Citation by Publication on Non-Residents; Also Creating Right for Personal Service on Non-Residents (New Rule 811);

1977, Requisites of Pleadings in Non-Resident Suits (New Rule 810);

2037, Requisites for Citation for Personal Service on Defendant Without State (New Rule 108);

2039, Requisites for Affidavit for Citation by Publication (New Rule 109);

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2042, Service of Citation by Publication (New Rule 116);

2043, Return of Citation by Publication (New Rule 117);

4656, Injunctions to Enjoin Execution of Judgments;

5529, Four Year Statute of Limitations;

5540, Four Year Statute Pleadable Only by Defendant;

7366, Requisites of Pleadings in Resident Suits (New Rule 783).

SUMMARY STATEMENT OF THE NATURE OF THIS CASE.

This is an independent suit strictly in equity, brought under the General Jurisdiction of a Court of Equity.

The Head of Equity under which relief was sought is that Jurisdiction of a Court of Equity involving Void Judgments.

The purpose of this suit is to enjoin Petitioners from asserting rights under, or claiming title to land described in, two state court suits, obtained by their ancestor, John R. Bevil, Sr.

For the purpose of invoking the General Jurisdiction in Equity to afford the relief sought, Respondents alleged and proved that they had such a justiciable interest in the

land described in the state court judgments as to warrant the court to look into their claim.

As a basis for such enjoinder, Respondents alleged two grounds as against each of the state court judgments.

The first ground is that the two judgments were void on the ground that the court rendering each judgment was without jurisdiction, as shown from the face of the record in each respective case.

The second ground is that the two judgments were void on the ground that they were obtained, or procured, by extrinsic fraud, fraud on the court in the very act of getting the judgments.

In each of the state court suits John R. Bevil, Sr., was Plaintiff, and these Respondents, and others, were named as Non-Resident Defendants; at one time John R. Bevil, Sr., owned the land in question, but by deeds and releases he sold the land for $28,000.00, collected and retained, and still retains, the same; the two state court suits were filed some twenty years later to regain a portion of this land, but Bevil had never acquired title back from his Grantee or these Respondents, as indirect grantees; the petition in the state court suits were in form that of Trespass to Try Title, but they had for their purpose the cancellation of his own deeds, as regards the portion of the land sued for, which was approximately one-third of that he formerly had sold.

As to the question of jurisdiction, in each of the two suits, service was attempted by citation by publication, a mode of service not known to common law. In each case the required affidavits were defective, and also in each case the petitions were defective; in one case the judgment was entered seven days before appearance day.

As to the question that the judgments were procured by fraud, J. R. Bevil, Sr., on each of the trials in state court, failed to put before the court the very deeds that he had given evidencing his own sale and conveyance of the land to which he sought judgment. In making out his title before the court, in each of said state court suits, Bevil stopped his evidence with the deed to himself, which was obtained by him prior to his giving the deeds conveying the land out of him.

There is no question of possession involved. Respondents, and not Petitioners, have possession of the land. There is no question of innocent purchaser involved, Petitioners take by descent from their deceased mother, and by will, in the form of a deed, from their father. There is no question of equities between the parties involved, Petitioners' ancestor having received, and not given, benefits.

No writs of execution, or of possession, were ever obtained under the two state court judgments, nor was possession otherwise obtained under said judgments; no rights, or claims, under the two state court judgments were ever asserted until Petitioners filed their motion to dismiss in this case.

Essentially this suit is between the original parties to the state court suits. No intervening third parties are involved.

The proceedings in the trial court were as follows:

On July 16, 1956, Plaintiffs, Respondents here, filed their original bill in equity, seeking relief against these two state court judgments;

On August 3d, 1956, Defendants, Petitioners here, filed their motion to dismiss setting up these same two state court judgments, and asserting title thereunder, this being

the first time Petitioners ever asserted any rights under the judgments;

Having claimed title to some 830 acres of land under these two state court judgments, and not having inventoried the same land in the administration of the estate of their mother, nor of their father, and never having filed an estate tax return, nor having paid estate tax, and the inventories of these estates having been sworn to and filed by these same petitioners, which revealed a value requiring a tax to be paid, with leave of court;

On January 3, 1957, Plaintiffs, Respondents here, filed their first amended bill in equity, impleading the United States, seeking to extinguish the tax lien, or the inchoate right to such a lien, on the same land, in this one suit;

On September 13th, 1956, Defendants, Petitioners here, filed their First Amended Motion to Dismiss;

On March 7th, 1957, Defendants, Petitioners here, filed their first Supplemental motion to dismiss, whereupon Plaintiffs, Respondents here, timely filed answer thereto;

On May 27, 1957, Defendants, Petitioners here, filed their first amended supplemental motion to dismiss, whereupon Plaintiffs, Respondents here, timely filed answer thereto;

On March 11th, 1957, Defendant, the United States of America, filed its motion to dismiss as to it, to which no action of the court was ever taken;

On March 18, 1957, the court tried the amended, and the first supplemental amended, motion to dismiss filed by the Defendants, who are Petitioners here; upon the trial of this motion the court overruled the same, and placed the case on the trial docket, to be tried on its merits, both as to these Petitioners and the Defendant, the United States;

On May 28, 1957, Defendant the United States filed its amended motion to dismiss, stating its ground that there was estate tax due from the estates of the mother and the father of Petitioners, that subsequent to the time it was made a party (January 3, 1957), and prior to May 28, 1957, the United States had determined the estate tax and had collected such tax, and that the tax lien had been satisfied, and was of no further force and effect; whereupon, the United States was dismissed out of the case on June 3d, 1957;

On October 17th, 1957, this case was tried, and the District Court entered its judgment; thereafter there were other motions for new trial, and motions for findings, all of which are in the record.

ARGUMENTS.

1. Jurisdiction of the District Court.

Where a suit is between citizens of different states, the statute provides:

> "The district courts shall have original jurisdiction of all civil actions where the *matter in controversy* exceeds the sum or value of $3,000. * * *"

This suit is one strictly in equity, asking for relief under one of the General Heads of Equity. An action *in personam*, and not *in rem*. An action seeking Equitable relief, and not seeking legal demands, such as damages, and the like.

The *matter in controversy* is two state court judgments, and not the title to the land described in the judgments.

This suit is one by those who were Defendants in the state court suits, to enjoin those who were Plaintiffs in those suits, from using the judgments obtained therein, before Plaintiffs therein got out execution on, or otherwise used, the said judgments, and before the rights of any third person intervened.

The grounds set up on which the enjoinder is based embrace the acts, and activities, of one person, those of John R. Bevil, Sr., who was the sole Plaintiff in the state court suits.

The Acts and activities complained of were onerous, and indivisible acts, but which affected all of the Defendants in the state court suits in precisely the same way and precisely at the same time.

On one ground complaint is made against the Plaintiff in the state court suits as to his failure to comply with state statutes in bringing suits under the citation by publication statutes against non-residents.

On the other ground complaint is made against the Plaintiff in the state court suits as to his fraudulent acts on the court in the act of obtaining the judgments, extrinsic fraud on the court.

It is these acts of the Plaintiff in the state court suits that constitute the *matter in controversy* in this suit.

John R. Bevil, Sr., acquired the north 2,059 Acres of the Hawley League (which embraces the land involved in the state court suits) as one tract of land, in the partition deed between him and W. D. Myers, Pltffs. Exh. 1.

In state court suit No. 8399 both the Petition of Plaintiff and the judgment described ONE tract of land, of 348 Acres. The petition further states that Defendants there-

in, Respondents herein, on June 1st, 1945, entered upon and took possession of this ONE tract of land.

In state court suit No. 8471 both the Petition of Plaintiff and the judgment described ONE tract of land, of 482 Acres. The petition further states that Defendants therein, Respondents herein, on June 1st, 1945, entered upon and took possession of this ONE tract of land. (This tract of land lies south of, and adjacent to, the tract described in suit No. 8399.)

In these state court suits Bevil dealt with this land as ONE tract in each suit, and dealt with Defendants as owning an undivided interest in each tract. On the merits in this case, Petitioners herein dealt with these same two tracts as if they were not divided, and argued before the courts below that the upper Block A of the League was not subdivided.

Under Petitioners' affirmative contentions in the court below, under Texas law, these Respondents would own an undivided interest in each of the tracts described in the state court suits.

Looked at from the standpoint of Petitioners, and the case before this court cited next below, as regards this jurisdictional question, Respondents have a common interest in the *matter in controversy*.

McDaniel v. *Traylor*, 196 U. S. 415, 25 S. Ct. 369.

Marshall v. *Holmes*, 141 U. S. 589, 595, 596, 35 L. Ed. 870, 872, 12 S. Ct. 62, 64.

Shields v. *Thomas*, 17 How. 3, 15 L. Ed. 93.

Davies v. *Corbin*, 112 U. S. 36, 5 S. Ct. 4.

Troy Bank v. *Whitehead*, 222 U. S. 39, 41, 32 S. Ct. 9, 56 L. Ed. 81.

Hunt v. *New York Cotton Exchange*, 205 U. S. 322, 27 S. Ct. 529.

Mississippip & M. R. Co. v. *Ward*, 2 Black. 485, 17 L. Ed. 311.

New Orleans Pac. Ry. Co. v. *Parker*, 143 U. S. 42, 12 S. Ct. 364, 366.

In *Davies* v. *Corbin* it was stated:

"They have a common interest in the tax, and it is perfectly immaterial to the tax collector how it is divided among them."

In *Mississippi & M. R. Co.* v. *Ward* it was decided that:

"jurisdiction is tested by the value of the object to be gained by the bill."

In *New Orleans Pac. Ry. Co.* v. *Parker* it was held:

"Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed $5,000."

In *Troy Bank* v. *Whitehead* it was stated:

"but when several plaintiffs unite to enforce a single title or right, in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount."

In *Shields* v. *Thomas* the court held:

"But the court thinks the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them according to the laws of the State. They all claimed under the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant, how it was to be shared among them.

> He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him."

In *Marshall* v. *Holmes* it was said:

> "Their validity depends upon the same facts. If she is entitled to relief against one of the judgments, she is entitled to relief against all of them."

In *McDaniel* v. *Traylor* it was stated:

> "The essence of the suit is the alleged fraudulent combination and conspiracy to fasten upon that estate a liability for the debts of John Evans, which were held by the defendants, and which they, acting in combination, procured, in co-operation with James Evans, to be allowed as claims against the estate of Hiram Evans. By reason of that combination, resulting in the allowance of all those claims in the probate court, as expenses of administering the estate of Hiram Evans, the defendants have so tied their respective claims together as to make them, so far as the plaintiffs and the relief sought by them are concerned, *one* claim. The validity of all the claims depends upon the same facts. The lien on the lands which is asserted by each defendant has its origin as well in the combination to which all were parties as in the orders of the probate court, which, in furtherance of that combination, were procured by their joint action. Those orders were conclusive against the plaintiffs, as to all the claims, if the claims could be allowed at all against the estate of Hiram Evans."

The Plaintiff in the state court suits so tied his *respective* claims together as to make them, so far as the Respondents and the relief sought by them are concerned, *one* claim. That, is the *matter in controversy*.

Respondents' Original Bill contained allegations of Fraud, and as a basis for fraud alleged one set of facts, on the part of J. R. Bevil, Sr., Plaintiff in each of the state court suits, going to the judgment as a whole, in each respective case. The allegations sought a determination of fraud, and, under Texas Law, fraud would vitiate the entire judgment, and not just a part of it. *Hutchins* v. *Lockett*, 39 Tex. 165, 166, where the Supreme Court of Texas held:

> "A judgment cannot be void in part and good in part; it must be either valid or void in whole; and where fraud attaches to a part only of a judgment the whole is a nullity."

The facts alleged brought this case under the doctrine announced in *McDaniel* v. *Traylor*, *supra*, and is, therefore, distinguishable from the cases cited by Petitioners on this point.

In addition thereto, Respondents' First Amended Original Bill, paragraph 13, and the supplemental Bill as to this paragraph 13, raises a Federal Question under 26 U. S. C. 827 (1939); 26 U. S. C. 6324 (1954), with relation to removing the Federal Lien for Estate Tax due by Petitioners.

When the District Court ruled on the Jurisdictional Question in this case, on March 18, 1957, there was Estate Tax owed on the Estate of Mrs. Bevil since 1942, and a Tax owed on the estate of Mr. Bevil since 1953. The Estate Tax being owed, the Tax Lien existed, and, the court, having ruled for Petitioners on the merits, was under duty bound to foreclose the lien in this suit, if the tax had not been paid at that time, since such lien cannot be waived. As to the tax being owed on March 18, 1957, when the Jurisdiction was ruled on, see Appendix, page A1.

This feature of the tax lien is also governed by *New Orleans Pac. Ry. Co.* v. *Parker, supra.*

Petitioners admit jurisdiction as to the Luckanick Respondents, on a value of $4,200, but question the value of A. D. Davies.

At the time the two state court judgments were rendered A. D. Davies owned 80 acres valued at $84, a total of $6,720.

In raising this question as to A. D. Davies, Petitioners entirely overlook the fact that A. D. Davies sues on his cause of action resulting from the fraudulent acts of Petitioners' ancestor. Conveying the land, subsequent to the fraudulent acts on which this suit is based, did not convey his cause of action founded on fraud. While no attempt was made by Davies to assign his cause of action originating in fraud, yet he could not, since a cause of action arising in fraud cannot be assigned as being against public policy, as held by this court in *Graham* v. *LaCrosse & M. R. Co.*, 26 L. Ed. 106, 102 U. S. 148, 161.

Possessing the cause of action to sue for fraud, A. D. Davies could sue for himself, and also sue for the benefit of his grantees. 1 C. J. 983, Sec. 87.b; *Atkins* v. *Moore*, 82 Ill. 240; *Brownell Imp. Co.* v. *Critchfield*, 64 N. E. 332; *Estey & Camp* v. *Williams*, (Tex. Civ. App.) 133 S. W. 470, 473; *French* v. *Shotwell*, 5 Johnson's Chancery 555, 565. In this last cited case it was held:

> "* * * and if the alienor bring error and be restored, the feoffe shall enter upon him."

Therefore, Petitioners' point that the District Court had no jurisdiction is without merit, and it should be here held that jurisdiction was sustained for all of the Respondents.

2. There Is No Conflict Between the Opinion by the Fifth Circuit and This Court in Hall v. Law, 102 U. S. 217.

The Opinion by the Fifth Circuit follows this Court in the case of *Galpin* v. *Page*, 85 U. S. (18 Wall.) 350-375, 21 L. Ed. 959.

By no stretch of the imagination can it be rightly said that the facts in *Hall* v. *Law* are analogous to the facts in *Galpin v. Page*, nor to the case at Bar.

No complaint was made that the court had no jurisdiction for lack of proper service, nor that the partition was obtained by fraud. Neither was there complaint that some of the parties were non-residents, nor that they were ignorant of the partition suit.

The only complaint was that after more than Forty years, no complaint could then be found in the record, when by the statute of that state none was ever required.

The Indiana statute involved did not require the filing of a written complaint, and the failure to find one forty years hence cannot be said to be a "non compliance" with that which was never required.

The case of *Galpin* v. *Page*, and the case at bar, involve matters required by the statutes to be complied with. The failure to comply with that which *is* required is not analogous to the failure to comply with that which is *not* required.

This point is unworthy of further comment.

3. The Rule of Absolute Verity Should Not Be Applied in This Case.

It can be said, without citation of authorities, that at Common Law service could not be obtained by Citation

by Publication. It can likewise be said that at Common Law a suit could not be entertained against a person beyond the territorial limits of the court, unless that person was found within the limits and could be served while he was within such limits.

Under Texas Statutes, as well as the California Statutes involved in *Galpin* v. *Page*, citation by publication may be made.

Under both sets of Statutes citation by publication may be made against citizens of a state, and also against citizens outside of the state.

This court, in *Galpin* v. *Page*, sets out three classes of judgments under this jurisdictional category, *i. e.*, where a judgment is rendered under a mode of procedure not known to the Common Law. These classes are as follows:

(1) Where a domestic court of general jurisdiction proceeds in a special manner over persons within its ordinary jurisdiction—that is, persons *within* its territorial limits;

(2) Where a domestic court of general jurisdiction proceeds in a special manner over persons not within its ordinary jurisdiction—that is, persons *outside* of its territorial limits;

(3) Where a domestic court of general jurisdiction attempts to act where it has not even potential power to act.

This court said that as to the judgments rendered in the first class a presumption *would* prevail to uphold the validity of the judgment.

This court also said in *Galpin* v. *Page* that as to judgments rendered in the second class a presumption *would not* prevail to uphold the validity of the judgment.

This court has consistently followed *Galpin v. Page*, a few of these cases are as follows:

Thompson v. *Whitman*, 18 Wall. 457, 469, 21 L. Ed. 897.
Settlemier v. *Sullivan*, 97 U. S. 444, 24 L. Ed. 1110.
Cheely v. *Clayton*, 110 U. S. 701, 708, 4 S. Ct. 328.
Guaranty Trust Co. v. *Green Cove*, 139 U. S. 147, 148, 11 S. Ct. 512.
Hansberry v. *Lee*, 311 U. S. 32, 61 S. Ct. 115, 117, 85 L. Ed. 22.
Griffin v. *Griffin*, 327 U. S. 220, 90 L. Ed. 640.

In *Thompson* v. *Whitman*, this court said:

> "The records of the domestic tribunals of England and some of the states, it is true, are held to import absolute verity as well in relation to jurisdiction as to other facts, in all collateral proceedings. Public policy and the dignity of the courts are supposed to require that no averment shall be admitted to contradict the record. But, as we have seen, that rule has no extra-territorial force * * *
>
> * * * On the whole, we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provisions of the 4th article of the Constitution and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself."

In *Settlemier* v. *Sullivan*, this court said:

> "The recital must be read in connection with that part of the record which gives the official evidence prescribed by statute. This evidence must prevail over the recitals, as the latter, in the absence of an averment to the contrary—the record being complete—can only be considered as referring to the former."

In *Cheely* v. *Clayton*, this court said:

> "The notice and return appearing of record in the proceedings for divorce control the general recital in the decree that due service had been made upon the defendant therein."

In *Wilbur* v. *Abbot*, 6 F[illegible]814, 816, commenting on *Galpin* v. *Page*, states:

> "* * * But the same case holds that this presumption is limited to the jurisdiction over persons residing within their territorial limits, and over proceedings which are in accordance with the course of the common law. The Abbots residing in New Hampshire when the judgment was rendered, no presumption can arise that they were duly served with notice of the suit * * * the Fifth district court of the city of New Orleans * * *."

In *Swift* v. *Myers*, 37 Fed. 37, 43, it was stated, in commenting on *Galpin* v. *Page*:

> "The court held that the presumption which the law implies in support of the judgment of a court of general jurisdiction, is confined to facts concerning which the record is silent, and limited to the case of persons within their territorial jurisdiction in a proceeding according to the course of the common law. * * * In none of these cases, nor any other to which my attention has been attracted, is it said or even suggested that the judgment of a state court cannot be questioned or attacked collaterally, either for want of jurisdiction of the subject-matter or notice of the proceeding to the defendants in a national court sitting in the same state."

The Texas Courts have likewise followed *Galpin* v. *Page* by this court. In addition to the cases cited by the Fifth Circuit, we cite the following Texas cases:

Bender v. *Damon*, 72 Tex. S. Ct. 92, 9 S. W. 747.
Murchison v. *White*, 54 Tex. 78, 82.
Mingus v. *Wadley*, 115 Tex. 551, 562, 285 S. W. 1084.
Watson v. *Rochmill*, 134 S. W. 2d 715.
Holmes v. *Buckner*, 67 Tex. 109, 2 S. W. 452.

The Supreme Court of Texas, in *Murchison* v. *White*, held:

> "* * * in a collateral proceeding, the only contingency in which the judgment of a domestic court of general jurisdiction, which has assumed to act in a case over which it might by law take jurisdiction of the subject matter and the person, can be questioned, is when the record shows *affirmatively* that its jurisdiction did not attach in the particular case. * * * This question in such a proceeding must be tried by the recitals in the record itself and the presumptions arising therefrom. If they show a case of jurisdiction, then in a collateral proceeding, upon grounds of public policy, the record purports absolute verity and is conclusive. * * * If, however, from the record itself it should affirmatively appear, either that the court did not have jurisdiction of the subject matter, or of the person, in a case where this was also required, or that the jurisdiction had not attached in the particular case, then the question can be raised upon objection to the record when offered in evidence, and no affirmative proceeding need be prosecuted to vacate it. Being a nullity upon its face, it could not legally be invoked against those whose just rights were sought to be affected by it."

The Supreme Court of Texas, in *Bender* v. *Damon*, held that a non-resident of Texas could collaterally attack a judgment on jurisdictional grounds for lack of service, in an action for title to land. In its opinion it held:

> "The petition, however, went further, and alleged facts which, if true, would render the judgment void.

It alleged that the plaintiff was a non-resident of this state; that he never was cited to appear, and did not appear, in person or by attorney. * * * If these accounts be true, the judgment was void, and no one could acquire rights under it."

The Supreme Court of Texas, in *Mingus* v. *Wadley*, following *Galpin* v. *Page*, after stating the statutory requisites, held:

"A proceeding of this type is a special one brought under statutory power to enforce a statutory cause of action in derogation of the common law, and there can be no presumption of jurisdiction. Jurisdictional allegations are an integral and necessary part of the case, without the statement of which there is no cause of action * * * the fact that the instant case was brought in the district court, a court of record of general jurisdiction, raises no presumption as to the jurisdiction, and does not obviate the necessity of pleading jurisdictional facts by the plaintiff. * * * The rule is well settled in most jurisdictions and in this state there is no presumption of jurisdiction where a court, although it is one of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the course of the common law, since under such circumstances the court stands with reference to the special power exercised on the same footing with courts of limited and inferior jurisdiction." (citing, among others, Galpin v. Page).

The Eastland Court of Civil Appeals of Texas, in *Watson* v. *Rochmill*, after discussing the general rule of absolute verity, states:

"An exception to such general rule exists when the judgment containing such recital further recites the facts on which the conclusion of due service is based and such recited facts show want of service, or when some portion of the record is referred to in the

judgment, and that portion of the record so referred to shows the judgment recital to be erroneous * * * citing Fowler v. Simpson and Lutcher v. Allen, relied on by the Fifth Circuit."

In each of the judgments in the two state court suits a reference is made to the findings of fact filed in the case. Those findings of fact were required by State Statute. The Record is complete. The complete record is in evidence in this case.

The Fifth Circuit followed Texas law, and did not conflict with it.

Furthermore, Petitioners did not, by their pleading and proof classify themselves as parties entitled to invoke the Absolute verity rule.

The Supreme Court of Texas, in *Crawford* v. *McDonald*, 88 Tex. Reports 626, 33 S. W. 325, set up the requisites for claiming the rule. The effect of the opinion in that case, applicable to the facts in this case, is that the record may be looked to, Petitioners not being innocent purchasers for value.

Still, this case is further distinguishable from the cases cited by Petitioners.

This case is one brought by the Defendants in the original suits against the Plaintiff in the original suit, for injunctive relief against the judgments in those cases, before executions in those judgments, or other claims asserted under them, and before any rights of third parties have intervened.

Injunctive relief lies to restrain execution. *Kern* v. *Freeze*, 96 Tex. Reports 513, 4 S. W. 303; *Ketelsen & Degetau* v. *Pratt, etc.*, 100 S. W. 1172; *Railway Co.* v. *Ware*,

74 Tex. Reports 47, 11 S. W. 918; *Edrington* v. *Allsbrooks*, 21 Tex. Reports 186.

In *Kern* v. *Freeze*, the Supreme Court of Texas stated:

> "* * * the enforcement of a judgment may be enjoined when, by the face of the record upon which it was rendered, it is shown to be void."

In *Edrington* v. *Allsbrooks*, the Supreme Court of Texas stated:

> "The proceedings had before the justice (as detailed in the petition) show that the judgment, for want of legal service on the defendant, was void; * * * A suit against absent persons is essentially of an *ex parte* character, and at the very least plaintiffs should strictly comply with the rules of procedure before judgment. Notice by publication is, at best, but a miserable substitute for personal service, but if this has not been given, the utmost equity that could be claimed by a plaintiff in such judgment was allowed in this case * * * the perpetual injunction of the void proceedings."

In *Ketelsen & Degetau* v. *Pratt, etc.*, the Court of Civil Appeals of Texas held:

> "It is settled in this state that injunction lies to restrain the execution of a void judgment. And it is not necessary that the judgment should disclose its invalidity upon its face, if this appears affirmatively from the record such a judgment is open to collateral attack. Kern v. Freeze, 96 Tex. 513, 74 S. W. 303. It would therefore seem that a proceeding to enjoin proceedings under such a judgment would not fall within the statutory provision quoted, requiring the matter to be tried by the court rendering the judgment. * * * We think that a judgment so appearing to be void may be dealt with by any court as of no effect whatever, and that it is not necessary in such a case to observe

said statutory provision." (The Statute referred to is Texas Current Art. 4656).

There is no requirement, under the Special Statutes creating the right to sue non-residents, that the judgment in such cases must contain a statement that due and legal service has been made, and if a judgment in a non resident case contains such recital it would be no compliance with any statute, *but voluntary.*

But there is a requirement, in the special statutes authorizing these non resident suits, that a statement of facts must be filed where no appearance has been made by the non residents.

The filing of the statement of facts is mandatory, and, therefore, jurisdictional. A judgment rendered where no statement of facts is filed is a nullity.

The Supreme Court of Texas, as early as 1852, in *McFadden* v. *Lockhart,* 7 Tex. 573, stated:

> "* * * it is to be considered as a qualification of the provisions of that section, applicable to judgments by default where service has been by publication, where the defendant has not appeared, and where, consequently, the hearing is *ex parte.* And we are of opinion that in every such case, whatever may be the cause of action, and whether liquidated or unliquidated, proved by parol, by written, or by record evidence, the provision of the statute, which requires a statement of the facts on which the judgment is founded, must be observed, and that its omission will be fatal to the judgment on error."

Petitioners here insist upon a rule that would require a purely voluntary statement, not required, to take precedence over a mandatory, and statutory, requirement which the Supreme Court says must be made if judgment is to

be effective. Such contention, by Petitioners, is wholly untenable.

The Supreme Court of Texas in *Bullock* v. *Ballew*, 9 Tex. 498, 500, held:

> "But if the judgment be void the defendant may plead the matters which show its nullity, and for that purpose he may bring before the court the proceedings anterior to its rendition."

The case at bar is in that class of cases covered by the exception, to and uncontrolled by, Art. 4656, announced by *Kern* v. *Freeze*, and *Ketelsen & Degetau* v. *Pratt Bros.*, and not in the class to which *Crawford* v. *McDonald*, and like cases, belong.

The Fifth Circuit correctly held that the cause of action set up in Respondents' Original Bill is maintainable under the General Jurisdiction of a Court of Chancery.

ALL CASES CITED BY PETITIONERS ARE DISTINGUISHABLE.

Petitioners fail to cite even one case analogous to the case at bar, and the propositions ruled on by the Fifth Circuit.

None of the cases they cite are between the same parties to the first suit in which the judgment involved, was rendered.

None of the cases they cite were suits to enjoin the execution of judgments, or to enjoin before the rights of third parties, or strangers to the suit, attached.

All of the cases they cite involve rights of innocent purchasers for a valuable consideration.

All of the cases they cite were Texas Cases involving judgments rendered by Texas Court.

None of the cases they cite involve judgments by a "foreign" court, or by a court of a sister state, or Federal Court.

All of the cases they cite were classified by the court rendering the opinion as falling within that class where the absolute verity rule may be applied, as distinguished from the class of cases where the rule is not allowed.

The distinction between the two classes of cases—those where the verity rule is allowed and those where it is not allowed—is made by the very cases they cite. For instance, in *Martin* v. *Burns*, the Supreme Court of Texas held:

> "The records of that court, however, as found by the court below, showed that it was by publication on an affidavit that the residence of the defendants were unknown, not that they, or either of them, were non-residents, or absent from the state."

Not only does the Supreme Court of Texas not conflict, or seek to conflict, with the Federal Cases, and cases by this court, but affirmatively states in *Martin* v. *Burns* that it will follow the rules of this court, for instance the Texas Supreme Court says:

> "It must now be regarded as the settled rule of decision in this state that when applicable the chief principle announced in Ponnoyer v. Neff will be observed. * * *"

The case cited by Petitioners as their leading case is that of *Bemis* v. *Bayou Development Co.*

The *Bemis* case dealt with a judgment rendered in a court in which service was obtained under Texas Statutes, Article 2037, now Rule 108, and the service was good under that article, and so admitted by the Plaintiff in the

Bemis case. Art. 2037 provides for personal service on non-residents, but Bemis was not seeking to show a "non-compliance" with that Statute, but took the view that the Legislature was without power to provide for this mode of service on a non-resident.

Article 1976 provides that, in those actions authorized by special Statute, Art. 1975, against non-residents, service may be made by publication, provided by law for publication of citation against defendants, which is Art. 2039, now Rule 109, also:

> "or by service of notice of the character and in the manner provided for by Articles 2037 and 2038. * * *"

What Bemis said was that service could not be made under Art. 2037, while the legislative enactment said that it could be so made. It has long been held by the Texas Courts, construing Art. 2037, that service could be made under this Article. *Thomson* v. *Shackelford*, 24 S. W. 980, 985; *Stewart* v. *Anderson*, 70 Tex. 588, 8 S. W. 295; *Wilson* v. *Zeigler*, 44 Tex. 657.

Article 2037 was formerly Art. 1230.

Bemis contended that service could not be made under Art. 1230 (now Art. 2037), evidently challenging the constitutionality of said statute as applied to non-residents.

But we find that the same contention was made before this court, and by decision handed down on February 26, 1900, this court held Art. 1230 to be a valid statute under the Fourteenth Amendment, and that a judgment rendered on service made, under Art. 1230, on non-residents outside of the jurisdiction of the state, was a valid judgment. *Roller* v. *Holly*, 176 U. S. 398, 20 S. Ct. 410.

In line with these cases, and following them, the court in the *Bemis* case classified it as falling within the class to which the absolute verity rule would be applicable.

But that is not the situation in the case at bar, nor is Art. 2037 the Statute involved here. We have an entirely different situation under an entirely different Statute. namely Art. 2039, the publication Statute, which is governed by the Rules of this court in *Galpin* v. *Page*, and Texas Case of *Mingus* v. *Wadley*, and other Texas cases.

Petitioners insist upon an interpretation of the *Bemis* case which the opinion in the case clearly shows to be otherwise.

Petitioners insist that the *Bemis* case holds that the verity rule prevents a reference to the record for any purpose, even a reference to determine whether the court had, or did not have, jurisdiction.

We say this is not the holding at all.

Assuming that the *Bemis* case made such a holding, as petitioners contend for, such holding itself would conflict with the Texas Decisions of the Supreme Court in *Murchison* v. *White*, of the Court of Civil Appeals in *Bilby* v. *Rodgers*, 125 S. W. 616, and the Texarkana Court of Civil Appeals in *First National Bank of Marshall* v. *Alexander*, 236 S. W. 229.

The Supreme Court of Texas, in *Murchison* v. *White*, says there *is* such a contingency, in a case over which the court *might* by law take jurisdiction (*i. e.*, by special statutory authority), that will permit a reference to the record to determine if the court had, or did not have, jurisdiction, and that contingency is:

> "* * * when the record shows *affirmatively* that its jurisdiction did not attach in the particular case. * * *"

This same case holds that, after looking at the record, and the *record* shows jurisdiction did attach, then, in that

event, the absolute verity rule would apply to keep out evidence dehors the record. This is the same as saying that a party litigant may look at the *record*, but he can look no further. That the validity, or invalidity, of the judgment will be determined from the *record* as it stood when the judgment was rendered.

The Court of Civil Appeals in *Bilby* v. *Rodgers* refused to apply the verity rule under Texas Article 1230, which is now Art. 2037, when the citation did not strictly comply with the Statute. And held that a judgment rendered by default could not stand when the citation did not comply with the statute. The non-compliance there held to be fatal to the judgment was:

> "It is well settled that these provisions are imperative, and a citation lacking in the essential element of naming all the parties to the suit will not support a judgment by default."

yet a certified copy of the petition was attached to the citation and that was served on defendant. This case went still further and held:

> "* * * where, as here, neither the proceedings nor the judgment show appearance of the defendant against whom the judgment is rendered, the citation must be copied in the transcript of the proceedings."

The Texarkana Court of Civil Appeals in *First National Bank of Marshall* v. *Alexander*, considered a case where a judgment had been obtained on an irregular service. Adopting part of the opinion of this court in *Harris* v. *Hardeman*, 14 How. 334, 14 L. Ed. 444, held:

> "Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not, therefore, to be estopped from proving any

fact which goes to establish the truth of a plea alleging the want of jurisdiction."

In determining what constitutes the record to be examined, the court continued:

"* * * it should be borne in mind, as a rule to guide and control our examination, that the judgment impugned before that court was a judgment by default, and that in all judgments by default, whatever may affect their competency or regularity, every proceeding, indeed, from the writ and endorsements thereon down to the judgment itself, inclusive, is part of the record and is open to examination."

In its own words, the Texarkana Court of Civil Appeals said:

"To say that a state court, after having usurped authority, may protect its usurpation by making a false record regarding the service of its initial process, is to legalize an indirect method of evading the Constitution."

This language by the Texarkana Court is practically the same language used by Judge Cameron in his concurring opinion in the case at bar.

Briefly stated, the Petitioners' own cases affirm the Texas Rule, where an action is against non-residents. In Texas, as elsewhere, the bare judgment is not given absolute verity, and jurisdiction is determined from the whole record.

The rulings made in this case by the Fifth Circuit do not conflict with the Texas decisions on a similar fact situation. Nor do such rulings conflict with any Decision of this court.

The Fifth Circuit felt that it should protect the Constitutional rights of these Non-Resident Respondents, and we f[illegible] that they were right in doing so.

Plaintiff in Each of the State Court Suits Committed a Fraud on the Court in Procuring Judgments Therein.

By deed of September 11, 1919, John R. Bevil, Sr., acquired a deed conveying to him the north 2,059 acres of the Hawley in Hardin County, Texas. On September 23, 1924, he executed three deeds conveying this same land to his grantee, Texas Little Farms Company. One of these deeds was for a $10,000.00 cash consideration and two were for vendor's lien notes. By three releases, December 1, 1924, March 27, 1925 and September 30, 1925, he released his liens and acknowledged receipt of $18,000.00 cash. Altogether acknowledging receipt of $28,000.00, the full consideration for the sale of the land.

In 1945, some twenty years later, he concocted a scheme as to how he might recover 830 acres of this land without paying for it, and without having to refund the purchase money he had received.

Most of this 830 acres was owned by persons living in the states of New York, Ohio and Pennsylvania. A small portion was owned by citizens of Texas, but he did not sue the Texas Citizens. These non-resident citizens lived approximately 2,000 miles away from the place he was to institute suit.

His concocted scheme was that he could file a lawsuit, in which he could set up a simple issue in a legal action of Trespass to Try Title alleging, merely, that he owned a fee simple title to the land, and get citation by publication.

His scheme also called for a plan in which he would not have to mention the deeds that he had given, neither in his pleadings nor in his evidence.

Pursuing his scheme, he set out in his petition the exact residences of the Defendants, naming them as non-residents and giving the places of their residences. This he verified, through his attorney, by affidavit.

He filed his petitions and affidavits, got out citation by publication all in Hardin County, Texas, but made no effort to personally notify the Defendants.

After some time expired he proceeded to trial. In one case Seven days before appearance day.

On the trial of each case, for his evidence, he put in a chain of title out of the State down to his partition deed of September 11, 1919, and stopped. From this evidence he obtained a judgment in each case. The evidence in each case was the same.

In the case at bar, in the trial court, it was determined that the three deeds executed by him September 23, 1924, conveying the entire quantity that he had acquired, and the three releases he had executed and delivered, were not presented to the trial court in the state suits. No objection was made to keep these three deeds and three releases out of the evidence in this case, instead, Petitioners in this case admitted that such was the case.

The Fifth Circuit found as a fact that this action by John R. Bevil, Sr., was a legal fraud on the trial court in the state suits, and classified these state suits as misleading actions. We think the Fifth Circuit was right in so finding.

The Texas courts have never condoned this specie of fraud but have always condemned it.

House v. *Collins*, 42 Tex. 486.

Hutchins v. *Lockett*, 39 Tex. 165.
Martin v. *Robinson*, 67 Tex. 369, 381, 3 S. W. 550.
Burdett v. *Silsbee*, 15 Tex. 604, 620, 621.

The Texas Supreme Court, in *Hutchins* v. *Lockett*, held:

> "Blevins * * * brought suit against Farquhar for specific performance. * * * Blevins made a tender into court of $150, the price agreed to be paid * * * and * * * took judgment against Farquhar by default for the land. Farquhar sued out an injunction to stay execution * * * said injunction was dissolved, the cause dismissed, and Farquhar gave notice of appeal to the Supreme Court * * * thereupon Blevins withdrew the $150, deposited in the court, which was the foundation of his judgment against Farquhar. This act of withdrawing from the court the purchase money for the land, without which no such judgment could have been rightfully asked or obtained, is claimed to have been such a fraud upon the court and its judgment as to destroy the validity of the latter, and to render it absolutely null and void.
>
> That a judgment rendered by a court of competent jurisdiction cannot be attacked in a collateral proceeding is a rule of almost universal application. Nevertheless, a judgment may be impeached in any proceeding upon the ground of fraud or satisfaction. * * * The court has only to determine that a judgment is founded in fraud, in order to authorize its impeachment as a nullity * * * there is no principle of law or equity which would recognize the judgment of 1861 in favor of Blevins for the three hundred acres of land, after he had withdrawn from the court the purchase money, as of any binding force or validity. It virtually became vacated by the fraudulent acts of Blevins, and the fraud related back to the rendition of the judgment and nullified the whole."

The Supreme Court of Texas, in *House* v. *Collins*, stated:

> "E. M. Collins pleaded as a defense to said judgment, and as a reason why it should not be revived as to her, that T. P. Collins never indorsed the note, and was not served with process, and had no notice of the suit in which the judgment by default was rendered, and that said Burnett had fraudulently caused it to appear on the record of said cause that service of process had been made upon Thomas P. Collins by the deputy sheriff. * * * The act thus charged on Burnett in being instrumental in making the record speak a falsehood, would have been fraud. * * *
>
> * * * The affirmance of the judgment by default, by the Supreme Court on appeal, did not preclude such an equitable defense from being set up in *scire facias* proceedings to revive the judgment."

The Supreme Court of Texas, in *Burdett* v. *Silsbee*, stated:

> "If the plaintiff can prove, as he insists, that there was fraud in the sale, to which the defendant was privy, or of which he is chargeable with notice, then, it is true, his title will not protect him either in his possession or his improvements."

The Supreme Court of Texas, in *Martin* v. *Robinson*, stated:

> "* * * it is true that courts of equity, by acting upon the party who has obtained through fraud something to which he is not entitled, has the power in many methods to prevent such a person from reaping any advantage from even a judgment obtained by fraud. The remedy which equity gives, as has been well said, 'reaches all those who were actually concerned in the fraud, all who directly and knowingly participated in its fruits, and all those who derive title from them voluntarily or with notice.' A court of equity will wrest property fraudulently acquired, not only from the perpetrator of the fraud, but * * * from his children and his children's children; or, as elsewhere said,

from any persons among whom he may have parceled out the fruits of his fraud."

The Fifth Circuit found as a fact that John R. Bevil, Sr., plaintiff in both state court suits, knowingly withheld from the consideration of the state court the three deeds and three releases he himself had executed and delivered, not only that, Petitioners admit in their pleadings that these deeds were not submitted to the court.

Bevil knew that if he mentioned these deeds and releases in either his pleadings, citations, or his evidence that the state court would be under duty bound to pass upon them. He further knew that if the court ruled the deeds were valid he could not get back the 830 acres. He further knew that if the court held the deeds void as to the land sued for that—he having invoked the equity jurisdiction of the court by his pleadings, he subjected himself to the maxim "he who seeks equity must do equity"—the court would be under duty bound to order him to refund the pro rata purchase price of the land he had sold (830/2059ths of $28,000.00, approximately $11,300.00), since the statute of limitations would not apply under his equitable plea (the praying part of his pleadings in both cases reads: "for such other and further relief, special and general, at law or in equity, as he may show himself entitled"). *S. A. & A. P. Ry. Co.* v. *Gurley*, 92 Tex. 229, 47 S. W. 513, 514; *Helmke* v. *Ry. Co.*, (S. Ct.) 21 N. Y. Supp. 345; *U. S. & M. T. Co.* v. *Delaware W. Const. Co.*, 112 S. W. 447, 461.

To escape both of these consequences, Bevil knew he would have to conceal from the court the existence of these deeds and releases, and their consequences.

The Fifth Circuit was right in holding that Bevil's knowing failure to submit these deeds and releases to the state court was a legal fraud of the kind which a court of equity will take cognizance.

Pomeroy, in his work on Equitable Remedies, states:

> "Whether there is active perjury or passive concealment there is still a fraud upon the court." Pom. Eq. Rem., Vol. 2, p. 1106, Sec. 656.

In *Curtis* v. *Schell*, 129 Cal. 208, 79 Am. St. Rep. 107, 61 Pac. 951, the Supreme Court of California held:

> "The complaint charges and the court finds the suppression of a material fact, which matter thus suppressed and withheld was a fraud, not only against the respondent, but also a fraud committed upon the court. The Fraud * * * was extrinsic and collateral to the questions examined on the application for the family allowance."

The commission of such a fraud is not only shocking to the bench, but to the bar as well.

The Fifth Circuit was correct in holding that these state court judgments were obtained by fraud on the court.

5. The Affidavits, Citations in Publication, and the Petitions in Both State Court Suits Were Defective under Texas Law.

The *right* to file a suit for title to land against non-residents of Texas exists only under special statutes. These special statutes are exclusive, and are entirely different from the general statutes involving title to land.

The right to file a title suit against non-residents is covered by Texas Civil Statutes, Arts. 1975 to 1979, inclusive; Articles 1977 to 1979 and part of Article 1976 are now Rules 810 to 813, inclusive, of Texas Rules of Civil Procedure.

The right to file a title suit against residents is covered by Texas Civil Statutes, Arts. 7364 to 7392, inclusive;

some of these articles are now Rules 783 to 809, inclusive, of Texas Rules of Civil Procedure.

Rule 783 sets out the requirements of the petition in suits against residents of Texas, while Rule 810 sets out the requirements of the petition in suits against non-residents of Texas. These Rules are copied on Appendix, pp-1 and 3, respectively, of Petitioners' Application.

Rule 810 provides, also, that citation may be made by publication.

Rule 109, former Article 2039, provides that an affidavit or oath be made in cases against non-residents where citation is by publication. This rule is set out on Appendix page 2 of Petitioners' Application.

The right to maintain a suit, involving a title to land, against non-residents is created by the special statute, Art. 1975, which is a substantive statute, and it still exists as such a statute.

This statute is as follows:

> "2. SUITS AGAINST NON-RESIDENTS.
>
> "Arts. 1975, 2172, 1504, Actions maintainable.
>
> "Persons claiming a right to or interest in property in this State may bring and prosecute to final decree, judgment or order, actions against non-residents of this State. * * *"

Thus it is clearly demonstrated that the right to sue a non-resident in a title suit is created by Special Statute, and the mode of procedure is by citation by publication, a mode of procedure not known to common law.

We have, then, existing, two conditions specified in *Galpin* v. *Page* which that case holds must be strictly construed in their application.

Although the District Court of Hardin County, Texas, is a domestic court of general jurisdiction, when it sits in a case authorized by special statutes, and exercised in a manner not known to common law, it acts as a court of special, or inferior jurisdiction, as stated, by the Supreme Court of Texas, in *Mingus* v. *Wadley, supra,* which statement is as follows:

> "The rule is well settled * * * in this state 'that there is no presumption of jurisdiction where a court, although it is one of general jurisdiction, exercises special statutory powers in a special statutory manner or otherwise than according to the course of the common law, since under such circumstances the court stands with reference to the special power exercised on the same footing with courts of limited and inferior jurisdiction' citing Galpin v. Page, and some 8 other Texas cases."

This court in *Galpin* v. *Page*, p. 369, states:

> "When, therefore, by legislation of a state, constructive service of process by publication is substituted in place of personal citation, and the court upon such service is authorized to proceed against the person of an absent party, not a citizen of the state nor found within it, every principle of justice exacts a strict and literal compliance with the statutory provisions."

The Supreme Court of Texas, in *Edrington* v. *Allsbrooks, supra,* held:

> "A suit against absent persons is essentially of an *ex parte* character, and at the very least plaintiff should strictly comply with the rules of procedure before judgment."

Applying the rule thus stated by this court and the Supreme Court of Texas to the statutes involved in this

case, it is conclusive a strict construction must be adhered to.

The Fifth Circuit did just that, and we believe every other court would have done the same. Adhering to this rule, the Fifth Circuit complied, and did not conflict, with the rules established by the Supreme Court of Texas, and this court.

AFFIDAVITS.

In suit No. 8399 the affidavit for publication was made two days before the suit was filed. This was not a compliance with the Rule that the *oath must* be made at the time the suit is instituted or sometime during its progress.

Under Texas Statute it must be made at the time suit is filed, or some time during its progress.

The Supreme Court of California, in *People* v. *Huber*, 20 Cal. 81, held that the affidavit could not be made so as to become operative at some future day when the plaintiff may see fit to commence his action, that court held:

> "The judge must be satisfied by affidavit of the absence of the defendant *at the time when he is applied to for his order, and when it is to take effect.*"

The Supreme Court of Michigan, in *McHugh* v. *Butler*, 39 Mich. 185, held that the provision authorizing the affidavit must be considered as intending that the oath must be at least substantially contemporaneous with the institution to the suit, holding:

> "The very nature of the regulation implies that it must be so timed as to show how the fact is when the party asserts a right of action, and not how it may have been at some earlier time. * * *"

The Supreme Court of Nebraska, in *Armstrong* v. *Middlestadt*, 36 N. W. 151, held:

> "Fairly construed, we think the act of verifying the petition, making the affidavit for publication, and the instituting of the action by filing the same in the office of the clerk of the district court of Pierce County, may be regarded as continuous acts in the bringing of the action to foreclose the tax lien."

The affidavit in case No. 8471 was made one day before suit was instituted, but this affidavit was made in another county. There is no reason to say that this oath was made contemporaneously with the instituting of the suit.

Judgment in Suit No. 8471 was entered SEVEN days before appearance day. That within itself renders it void, as held by the Fifth Circuit.

Petitioners raise no issue in this court at all on the judgment in Suit No. 8471, neither as to the affidavit nor to the premature entering. Therefore, we must take it that they do not contest the Fifth Circuit ruling on it.

PETITIONS AND CITATIONS.

When we read the requirements for the petitions, Rule 783 for residents, and Rule 810 for non-residents, we readily see that the Petitions in each of the two suits follow the requirements for residents instead of the requirements for non-residents. It is evident, therefore, that the real intention was not to follow the requirements for non-residents.

The petitions in non-resident suits are required to show the interest of the plaintiff, and the citations for publication are required to show the interest of the Defendants. Rule 810 is instructive as well as informative, this rule

provides, *and such proceedings shall be had in such action as may be necessary to fully settle and determine the question of right or title in and to said property between the parties to said suit.* This instruction is in connection with the requirement of the petition to be filed, and is strictly procedural. This instruction embraces every issue of *title* and every issue of *right* of both the Plaintiff and the non-resident Defendants. This includes every equitable right as well as every legal right to the property involved.

Certainly Rule 810 requires that Plaintiff plead his true cause of action, and not a cause of action that he does not possess.

What then was Bevil's true cause of action?

Bevil stopped his evidence with the partition deed of 1919. No one questioned that deed, as all the Defendants, as well as Plaintiff himself, claimed under that deed.

Bevil's true cause of action, if any, was just what the Fifth Circuit said it was, to remove the effect of his own deeds.

Assuming, without admitting, that the deeds were absolutely void, still it was Bevil's duty to set up in his petition allegations negativing the validity of these particular deeds, and by his evidence to prove the invalidity.

14 T. J. 1024, ss 229, n. 12.

McDougal v. *Conn*, (Civ. App.) 195 S. W. 627, 635.

Hill v. *Allison*, 51 Tex. 390, 391.

Day Land & Cattle Co. v. *State*, 68 Tex. 526, 4 S. W. 865.

McCampbell v. *Durst*, 40 S. W. 315, 321 (Tex. Civ. App.).

In *McCampbell* v. *Durst*, the Texas Civil Appeal Court held:

> "The right of the injured persons * * * must be set up by special pleading in a direct proceeding, and cannot be made effectual under the general allegations of the petition, or of the plea of 'not guilty,' in trespass to try title. Citing many Texas Cases."

The case of *McDougal* v. *Conn* was a suit by the heirs of Grantor in a prior deed, in which the heirs, children of Grantor, sought to impeach their Ancestor's deed on the ground that it was void for ambiguity of description of the land, the same identical ground claimed by Petitioners in this case. The Beaumont court of civil appeals held:

> "(6) The burden of proof was upon the plaintiff in this case, who was the intervenor originally."

The effect of the ruling was, that the burden of proof is upon him who seeks to show that a deed is void for ambiguity in the description.

The purpose of Bevil's suits being to avoid his own deeds, the burden was on him to plead and prove their invalidity.

Another defect in the petitions and the citations occurred in the descriptions.

Bevil having sold the land by "Lot" or "tract" number he was under duty bound to use the same description in his suit to avoid that description.

More than that, however, in making the sale of the land, Bevil made another map, extended all of the subdivision lines, and inserted tract numbers, in sequence to the tract numbers shown on the recorded map, and signed this map in his own handwriting, a part of the record in this case.

In holding that the defects were fatal, The Fifth Circuit followed Texas Statutes and Rules of Civil Procedure.

6. The Procedure in Both State Court Suits Were Defective under State Law on Jurisdictional Grounds, and They Were Both Obtained by FRAUD ON THE COURT.

It is difficult to understand just what Petitioners' intentions are under this point. On first glance it would imply a condition peculiar to Suit No. 8399, and since they say No. 8399 is valid, we must imply they now agree that No. 8471 is invalid.

We cannot, of course, agree that either judgment is valid, but we must say that both judgments were ABSOLUTELY VOID, on each of the grounds alleged and proved.

There can be not the slightest doubt about the Fraud Committed in the procurement of these judgments. Plaintiff in each of the state court suits concealed, and suppressed evidence constituting the foundation of those suits.

Bevil sold his land and got his money. To get the land back without refunding the purchase price is wrong, and any civilized man knows it is wrong, and any sincere lawyer, whether he checks land titles or not, knows that such actions constitute Fraud in its very worst stage. Any civilization worthy of existence will not tolerate such big Fraud as practiced in the state courts.

Petitioners try to argue that they can now, by evidence *aliunde* of the record, establish jurisdiction. But that cannot be done under the rules announced in *Galpin* v. *Page*, and in *White* v. *Murchison*. The judgments must stand or fall upon the record made at the time the judgments were rendered.

Even an appearance after the rendition, of a void judgment, does not give it validity. *Iola State Bank* v. *Trant*, Tex. Civ. App., 240 S. W. 621; 4 C. J. 1370, Sec. 69, B. The holding in both of these authorities is, "The appearance of a defendant in court after a judgment, does not waive any jurisdictional defects." A judgment obtained by Fraud, may be shown to have been so obtained, even after the original judgment has been appealed to the Supreme Court of the State, *House* v. *Collins*, 42 Tex. 486.

7. Statutes of Limitation Do Not Apply to an Action on a Void Judgment. The Burden of Proof Is on One Who Sets Up the Statute.

Petitioners, under this point, urge the Four Year Statute of Limitation, Art. 5529, they also urge the Dissenting Opinion of Judge Hutcheson.

Judge Hutcheson considered this a case analogous to a Bill of Review, and not a suit strictly in equity under the General Jurisdiction of a Court of Equity. This suit being one to enjoin the execution of a void judgment, and remove a cloud from title, he evidently had Texas Statute, Art. 4656, in mind.

The case at bar alleges, in the original bill, that both state court judgments are *void*, on two different grounds. First that the court rendering them had no jurisdiction, and Second that the judgments were obtained by Fraud.

The jurisdictional defects are discussed under Point 5, and the Fraud is discussed in Point 4..

The Fraud alleged and proved is *extrinsic* fraud, and is distinguishable from intrinsic fraud.

Fraud as to some matter submitted to the trial court is analogous to Fraud in the procurement of deeds, and

other contracts, and is called intrinsic fraud. But Fraud in some matter that did not go before the trial court, such as concealment and suppression, is extrinsic of anything that was before the court.

It is this *extrinsic* fraud that the Fifth Circuit found to exist in the state court suits, and it is this specie of fraud the Fifth Circuit ruled on.

Pomeroy clearly distinguishes these two species of fraud his statement is:

> "The ground for the exercise of this jurisdiction is that there has been no fair adversary trial at law. Consequently a distinction is made between fraud, accident, mistake and the like relating to the subject-matter of the action and similar elements relating to the conduct of the suit. Fraud relating to the subject-matter is not of itself sufficient ground for relief. Where it relates to the conduct of the suit, as where it prevents a party from asserting his rights, there is no fair adversary proceeding, and equity will interfere. The courts commonly speak of the former class as intrinsic and of the latter as extrinsic fraud, etc. Thus, it is generally said that it is extrinsic fraud, mistake and the like which are grounds for relief. 2 Pom., Eq. Rem., 1092, Sec. 648. On page 1091 under Sec. 647, he states: The ground for the equitable jurisdiction to interfere is, therefore, something dehors the issues, something arising out of or connected with the *trial* itself of the legal action in the court of law."

On page 1106, Sec. 656, Pomeroy states:

> "Whether there is active perjury or passive concealment, there is still a fraud upon the court."

The above distinction has been made by this court in *U. S.* v. *Throckmorton*, 98 U. S. 65, 66, 25 L. Ed. 93, 95.

The above distinction has likewise been made by the Texas Courts. 25 Tex. Jur. 604, Sec. 200, states:

> "Fraud vitiates every transaction tainted by it, even the solemn judgments of courts of record. Accordingly a judgment procured by fraud may be annulled by a direct proceeding instituted by a party whose rights are prejudiced."

25 Tex. Jur. 606, Sec. 201, states:

> "The acts or conduct for which equity will annul a judgment rendered by a court of competent jurisdiction—the parties to the judgment and to the equity suit being the same—have relation to fraud extrinsic or collateral to the matter tried and not to fraud in the matter on which the judgment was rendered. *Citing Reed* v. *Bryant*, (Civ. App.) 291 S. W. 605; *Warne* v. *Jackson*, (Civ. App.) 273 S. W. 315; *Bearden* v. *Texas Co.*, 41 S. W. 2d 447, 462, Texas Court of Civil Appeals."

In *Bearden* v. *Texas Co.*, the court stated:

> "It must be borne in mind that it is not fraud in the cause of action, but fraud in its management which entitled a party to relief. The fraud for which a judgment may be vacated or enjoined in equity must be in the procurement of the judgment * * * for judgments are impeachable for those frauds * * * which the court has been imposed upon or misled into a false judgment. * * * All mistakes and errors must be corrected from within by motion for a new trial, or to reopen the judgment, or by appeal. The Fraud must be 'in some matter other than the issue in controversy in the action."

These Texas cases, as well as the other cases, clearly distinguish intrinsic and *extrinsic* fraud.

The three Bevil deeds and the three Bevil releases were not before the state court, neither by petition, cita-

tion, nor evidence. The state court did not pass on these instruments, and, in the state of the record, it could not have done so.

In the management of the two state court suits these Bevil deeds and releases were suppressed, and concealed from the court.

Without these Bevil deeds and releases the state court could not adjust all the "titles" and "rights" between the parties, as provided by Rule 810.

By misleading the court in this matter, the Plaintiff committed a fraud on the court, a fraud classified as *extrinsic* fraud, and the Fifth Circuit was correct in so holding.

The judgments were held to be void on both grounds.

The judgments being void, Texas Art. 5529, the Four year statute of limitations, does not apply.

McCamant v. *McCamant*, Civ. App., 187 S. W. 1096.
Southern Ry. Co. v. *Vance*, 155 S. W. 698.
Mote v. *Thompson*, Civ. App., 156 S. W. 1105, 1107.
Davis v. *Howe*, Civ. App., 176 S. W. 759, 761.
Texas Co. v. *Davis*, S. Ct. Tex., 254 S. W. 304, 309.
State Mortg. Corp. v. *Ludwig*, 121 Tex. 268, 48 S. W. 2d 950.
Pannell v. *Askew*, Civ. App., 143 S. W. 364.

The case of *McCamant* v. *McCamant* held:

> "A judgment whose invalidity is apparent upon the record may be successfully attacked at any time and under any circumstances. * * * If the want of jurisdiction over either the subject or the person appears by the record, there is no doubt the judgment is void * * * Nor will lapse of time nor laches affect the right to vacate a judgment void on its face."

In *Mote* v. *Thompson* the four year statute of Texas, Art. 5529, was urged against a void judgment and it was held that the statute did not apply.

In commenting on *Mote* v. *Thompson*, the court in *Davis* v. *Howe*, stated:

> "There was an assignment * * * based upon exceptions referable to the four-year statute of limitations as applied to the judgment, and on account of the nature of the action of trespass to try title, and the judgment being void, of course the statute of limitations would have no application whatever."

The record in the case at bar shows that the Defendants in the state court suits, Respondents here, held possession of the land described in the state court judgments. Respondents holding possession the count asking that the judgments be removed as a cloud on the title would never be barred. On this feature of the case, the Supreme Court of Texas in *Texas Co.* v. *Davis*, has held:

> "Since the injury from a cloud on the title to real estate is continuing the cause of action for its removal is likewise continuing, and never barred while the cloud exists."

In *Estey & Camp* v. *Williams*, 133 S. W. 470, The Court of Civil Appeals of Texas, citing Black on Judgments, Vol. 1, Sec. 317, stated:

> "It will be remembered that such persons have the right to impeach a judgment collaterally whenever and wherever it comes in conflict with their rights, if it was founded in fraud and collusion."

The judgments being absolutely void no statute of limitations would run against them. But under the theory insisted upon, Petitioners had the burden of alleging and proving the facts to invoke the bar of limitation.

Texas Statute, Art. 5540, provides:

> "The law of limitation shall not be available in any suit unless it be specifically set forth by the party who in his answer invokes it as a defense."

In *Hanks* v. *Houston Oil Co.*, 173 S. W. 635, 638, the Texas Court of Civil Appeals held:

> "From the necessity to plead a fact generally results the necessity of proving it affirmatively."

The two state court judgments were obtained in 1945. Respondents' deeds were given in 1925. Respondents' chain of title stopped Twenty years before the judgments existed. There exists no duty of a land owner to check his title every morning to see if strangers have clouded his title. The rendition of an *ex parte* judgment, or the giving of a deed, subsequent to his acquisition, though recorded, is no notice to a land owner. *Cox* v. *Clay*, 237 S. W. 2d 798.

Petitioners in their answer (Tr. R. p. 90, Par. XIII) admit they have no facts as to when Respondents first knew of the existence of the state court judgments.

On the trial in the case at bar Petitioners made absolutely no attempt whatsoever to offer any evidence as to when Respondents first knew of these judgments.

The nature of this case is such, that, in their complaint, Respondents pleaded a cause of action which did not of itself allege facts that would have started the statute to run, if it had been applicable.

Petitioners in their answer (Tr. R. p. 82) pleaded the Four year Statute only in a general way. In this pleading they alleged no fact whatsoever that would have, if proved, started the running of the statute.

In the record in this case, and which was before the Fifth Circuit, there is no evidence whatsoever of any fact that would have started the statute to run. Further there was no pleading of any particular fact before the Fifth Circuit.

The Supreme Court of Texas held in *Williams* v. *Pure Oil Company*, 124 Tex. 341, 78 S. W. 2d 929, 931:

> "It seems to be the settled law of this state that limitation does not begin to run until the right or cause of action accrues. The right or cause of action does not exist until facts exist which authorize the person asserting the claim to seek relief in a court of competent jurisdiction from the person due to make reparation. It involves both the existence of the right (cause of action) and facts sufficient to constitute a cause of action."

Petitioners living 2,000 miles away, never having been personally notified of the suits, and judgments having been obtained in their absence, what facts, then, would constitute, or put them on, notice?

Respondents contend, in the state of the record, that Petitioners would either have to take actual possession of the land, or assert some right or title under the judgments and bring such assertion home to the knowledge of Respondents.

Corpus Juris 51, p. 199, Sec. 126, states the rule thus:

> "Limitations may be invoked as a defense to the action, except where plaintiff is in the actual possession of the land, claiming to be the owner thereof. But limitations will not run in favor of an adverse claimant not in possession. Nor can the statute be invoked where the parties claim through a common source, and the action involves merely the construction of a deed. The statute of limitations does not begin to run

in favor of defendant, so that he may invoke its running for the prescribed period as a defense, until some assertion of right or title to the premises has been made by him, and until such assertion of right or title to the premises has been brought to the knowledge of plaintiff."

The Law in Texas is the same. In *Pannell* v. *Askew*, 143 S. W. 364, 365, the Texas Court of Civil Appeals had before it a case involving a deed that had been executed but never delivered by grantor; possession of the deed had been unauthoritatively obtained, and recorded. When the fact of recordation had been discovered, the grantor filed suit to cancel the deed and remove it as a cloud on title. In that case the Defendant set up the Four year Statute of Texas, the same statute as is involved in this case. In disposing of that case, the court said:

> "We do not think the statute of limitations had any application to the case made by the testimony. It did not appear that appellees ever had possession of the land, or had otherwise, until appellant commenced her suit, asserted title to it by virtue of the deed."

In *Openshaw* v. *Rickmeyer*, 102 S. W. 467, 469, the Texas Court of Civil Appeals held:

> "No limitation would run against the plaintiffs' right to have the alleged mortgage cancelled and released until the mortgage debt was discharged, or until the defendant refused to allow them to redeem the property. It was therefore immaterial when they learned that the instruments were absolute deeds."

Petitioners not being in possession of the land, and not asserting any right under the judgments, the statute of limitations never began to run, even if they had been applicable.

It being mandatory by State Statute for Petitioners to plead and prove facts sufficient to start the running of the statute of limitations, and they having completely failed to do so, the Fifth Circuit was wholly correct in its ruling on this point.

Judge Hutcheson labored under a great misapprehension on the theory that this suit should have been filed in the court rendering the judgments.

Texas Statute, Art. 4656, requiring injunctions to be brought in the court where the case is pending, or the court in which the judgment was rendered, has no application to a suit strictly in equity to enjoin the execution of a *void* judgment.

Ketelson v. *Pratt*, (Civ. App.) 100 S. W. 1172.
Cotton v. *Rea*, (Tex. S. Ct.) 163 S. W. 2, 4.
Beaird v. *Eastland Co. Land & Abst. Co.*, (Civ. App.) 211 S. W. 478.
Wright v. *Shipman*, (Civ. App.) 279 S. W. 296.

In *Cotton* v. *Rea*, the Texas Supreme Court held:

> "Our view is that, if the judgment was a nullity as affirmatively disclosed by the record, it was subject to such collateral attack in any competent court otherwise vested with jurisdiction of the immediate action in which it might be challenged; that the authority of the court to restrain the enforcement of such a judgment is uncontrolled by article 4653 (now 4656) but proceeds from its power, in the exercise of a jurisdiction otherwise appropriately invoked, to protect rights from the operation of a void proceeding."

In *Wright* v. *Shipman*, the Texas Court of Civil Appeals, in construing this very same Statute, Art. 4656, held:

> "This statute has been frequently construed in this state in reference to this very question, with the result

that it is now the settled law of this state that such statute has no application to a void judgment, provided such fact appears on the face of the judgment or from an examination of the record."

These Texas cases conclusively prove that Judge Hutcheson was in error, and that the majority opinion is correct.

CONCLUSION.

All issues submitted by Petitioners in their application for writ of certiorari have previously been submitted to this court, and have properly been ruled on by this court, adversely to Petitioners' contention;

All relevant State issues submitted have previously been submitted to the state courts, and have properly been ruled on by the Texas Courts adversely to Petitioners' contention;

Petitioners raise no new points of law.

Wherefore, Respondents pray that Petitioners' application for a writ of certiorari to the Fifth Circuit Court of Appeals be, in all things, denied.

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CERTIFICATE OF SERVICE.

We, Robert Felix Roberts, and Hugh G. Freeland, Attorneys for Respondents herein, Members of the Bar of the Supreme Court of the United States, acknowledge that we received a copy of Petitioners' Application for Writ of Certiorari on January 16th, 1959; we hereby certify that on the 31 day of January, 1959, we served copies of the foregoing Brief in Opposition on Petitioners by mailing one copy each to William Hamlet Blades, 1009 San Jacinto Building, Houston 2, Texas; Terrell Buchanan, Silsbee, Texas; and B. F. Whitworth, Jasper, Texas, their attorneys of record.

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